

IV.C.2. Counsel

Overview

Introduction

Due to the complexity of abusive corporate tax shelter cases, it is recommended that local counsel be contacted at the outset of the examination. The earlier counsel is involved in the examination, the more effective assistance they can provide.

Examples of Counsel Support

Examples of local counsel assistance in tax shelter examinations include the following:

1. Identifying and evaluating potential legal positions;
 2. Helping determine whether formal field service advice or technical advice is necessary;
 3. Identifying facts that need development and sources of potential information;
 4. Assisting in determining whether an in-house or outside expert should be retained during the examination, and if so, the type of expert and qualifications;
 5. Identifying other cases under examination sharing a common promoter and/or transactions involving similar structures or issues and assist in coordinating consistent case development and legal positions;
 6. Assisting in drafting of the revenue agent's report and the notice of deficiency;
 7. Assisting in drafting consents for statute extensions;
 8. Assisting in navigating the TEFRA provisions; and
 9. Assisting in evaluating the application of penalties.
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Overview, Continued

Information Gathering

Local counsel can provide the following assistance in the information gathering process:

1. Drafting of IDRs;
 2. Assisting in securing timely responses to IDRs;
 3. Drafting of summonses;
 4. Providing advice on procedural aspects of serving summonses, including notice procedures;
 5. Assisting with foreign document requests and/or assisting in the procedural aspects of securing offshore documents;
 6. Identifying witnesses to be interviewed;
 7. Assisting in witness interviews;
 8. Providing advice on privilege claims; and
 9. Providing advice on disclosure issues.
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Interactions with Taxpayers

Some of the assistance local counsel can render in interactions with taxpayers is:

1. Accompanying agents to meetings with taxpayer and taxpayer's counsel;
 2. Assisting with responses to taxpayers' submissions;
 3. Evaluating taxpayers' protests; and
 4. Attending taxpayer conferences at Appeals.
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Overview, Continued

Liaison with Counsel National Office and Treasury

Some of the assistance local counsel can render in liaison with National Office and Treasury is:

1. Requesting field service advice;
 2. Assisting with requests for technical advice;
 3. Monitoring progress of TAMs;
 4. Accompanying agents to meetings with National Office/Treasury; and
 5. Designation of Cases for Litigation.
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Importance of National Office Assistance

It is important to seek assistance and direction from the National Office in developing facts and legal positions to attack abusive corporate tax shelter transactions for the following reasons:

1. It insures that anticipated legal positions are consistent with Service position and are supportable.
 2. It determines, at an early stage, whether additional legal positions not considered by the field should be developed and asserted.
 3. It provides an opportunity to assess the strengths and weaknesses of the case for consideration by the field and Appeals, should the case reach that level.
 4. It facilitates the consistent treatment of similarly situated taxpayers.
 5. It apprises the National Office of the transaction and the nature of the abuse, allowing the National Office to:
 - a. notify other examiners to look for the potential abuse;
 - b. issue guidance to the field and to the public;
 - c. consider designating the issue for litigation; and
 - d. seek legislative or regulatory remedies, as appropriate.
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Field Service Advice

Background Field Service Advice is case-specific written advice provided to the field by national office counsel. In non-docketed cases, it is provided in response to a request for assistance from any field office. The advice can only be requested by field counsel. Field Service Advice can provide:

- guidance as to the interpretation or application of internal revenue laws;
 - advice concerning the development of factual information that will be necessary to determine the proper application of the law to the facts of a particular case; and
 - an assessment of litigation hazards or strategies.
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Taxpayer Participation Taxpayer participation in the field service advice process is not mandatory, but rather is within the discretion of the field office having jurisdiction over the case. The field office may inform the taxpayer that field service advice is being sought and may offer the taxpayer an opportunity to comment, either orally or in writing, about the facts or law pertaining to the issue that is the subject of the request.

Purpose of FSA Field Service Advice is intended solely to assist the field office in resolving the matter that is the subject of the advice. It does not represent a final determination of Service position, even in the case in which it is requested. Rather, the determination of Service position in that case is made through the exercise of the independent judgment of the field office having jurisdiction over the case, taking into account its factual and legal research, any field service advice received, taxpayer input, and all other relevant information. Field service advice may be a factor in the field office's determination, but should not be used as a substitute for the independent judgment of the field office.

Distribution Field service advice is prepared by the National Office and distributed to field employees. It is considered "Chief Counsel Advice (CCA)" and is provided to the taxpayer and disseminated to the public in redacted form, deleting taxpayer identifying information, other taxpayer specific information and information subject to privilege.

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Technical Advice Memoranda

Introduction Examiners may request technical advice regarding any issue. Technical advice is written advice, furnished by the National Office in response to technical or procedural questions on the interpretation and proper application of tax laws, tax treaties, regulations, revenue rulings, notices, or other precedents published by the National Office regarding a specific set of facts.

Procedure The procedures for requesting technical advice are set forth annually in the second revenue procedure issued each year, most recently in Rev. Proc. 2002-2, 2002-1 I.R.B. 82. The technical advice procedures allow taxpayers to participate in the technical advice process and receive a copy of the resulting Technical Advice Memorandum (TAM) that is issued. Technical advice does not include legal advice furnished to the field in writing or orally, other than advice specifically furnished in accordance with the revenue procedure.

Background Technical Advice is intended to establish the proper interpretation and application of the internal revenue laws to the facts of a specific case, and represents a final determination of Service position with respect to a specific issue in a specific case. Technical advice applies only to the taxpayer for which the advice was requested. A taxpayer may not rely on a TAM issued by the Service for another taxpayer. See I.R.C. § 6110(j)(3). However, pursuant to I.R.C. § 6110, TAMs are released to the public with certain information deleted. See I.R.C. § 6110(c).

Who makes request? Technical advice is requested by field examination personnel, although taxpayers may also ask that an issue be referred for technical advice.

Who is bound by a TAM? The Service must process the taxpayer's case on the basis of the conclusions reached in the TAM, unless it requests reconsideration. In the case of a TAM that is unfavorable to the taxpayer, Service representatives and the taxpayer may agree to settle the issue under existing authority. The taxpayer is not bound by the advice if it is unfavorable.

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Technical Advice Memoranda, Continued

Conclusion

While use of the TAM procedures depend on the facts and circumstances of each case, they typically will have very limited application in the vast majority of tax shelter cases. The TAM procedures as currently configured are intended for technical issues where there is agreement on the facts. Tax shelter examinations are usually fact intensive, however, and critical facts, such as business purpose, will almost always be in dispute. Additionally, it is not always clear that all material facts are known in shelter cases, even by the conclusion of the examination. In situations where agents need assistance in factual development and in assessing the strengths and weaknesses of their cases, a better procedure for securing National Office advice is through field service advice. If agents encounter unusual circumstances that they believe are better suited for the TAM procedures, they should consult local counsel.
